

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

MAR -3 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0335-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
TRACEY LEANNE THOMPSON,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20004197

Honorable Javier Chon-Lopez, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Robert J. Hirsh, Pima County Public Defender
By Kristine Maish

Tucson
Attorneys for Petitioner

E C K E R S T R O M, Judge.

¶1 Petitioner Tracey Thompson seeks review of the trial court’s order denying her petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which she alleged the court had erroneously ordered restitution. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Thompson has not sustained her burden of establishing such abuse here.

¶2 Pursuant to a plea agreement, Thompson pleaded guilty in 2001 to trafficking in stolen property and “guilty except insane” to armed robbery. The trial court committed Thompson “to the jurisdiction of the Psychiatric Security Review Board” (PSRB) for a period of 10.5 years on the armed robbery charge and imposed a five-year prison sentence on the trafficking conviction, to “be served consecutively to any course of treatment involving the Arizona State Hospital.” On the trafficking conviction, the court also ordered Thompson to pay restitution to the victims of her offense.

¶3 In 2009,¹ Thompson petitioned for post-conviction relief, arguing the trial court had erred in ordering her to pay restitution because her “guilty except insane” plea

¹Thompson initiated Rule 32 proceedings over seven years after she was sentenced. Her petition was therefore not filed within the time provided by Rule 32.4(a). In her petition, she argued that because she had been committed to the jurisdiction of the PSRB and had not been advised orally of her right to seek post-conviction relief at sentencing, the delay in filing her petition was through no fault of her own. *See* Ariz. R. Crim. P. 32.1(f). The trial court apparently accepted that Thompson had been without fault in regard to the delay, as it determined she had “stated a colorable claim” and ordered a hearing. The state asserted below that it had no objection to the timeliness of her filing, and it does not challenge the court’s implicit decision on review.

on the armed robbery charge was not a criminal conviction and rendered the restitution order unlawful. *See State v. Heartfield*, 196 Ariz. 407, ¶ 6, 998 P.2d 1080, 1081 (App. 2000) (“[A] finding of guilty except insane is [not] a conviction for purposes of restitution.”). After a hearing, the court denied relief, concluding the claim was precluded and, even if not precluded, it failed because Thompson had agreed to pay restitution in her plea agreement. On review Thompson reiterates many of her arguments made below and maintains the court abused its discretion in so ruling.

¶4 First, Thompson did not object at her sentencing hearing to paying restitution as described in her presentence report. Because she therefore waived the issue, it is precluded, and the trial court could have disposed of the matter solely on that basis. *See Ariz. R. Crim. P. 32.2(a)(3)*. In any event, Thompson has not established the court abused its discretion in denying her petition on the merits.

¶5 The trial court did not order restitution on the charge to which Thompson pleaded “guilty except insane,” but rather on her conviction for trafficking in stolen property. And, a court can order restitution for losses resulting from a crime other than that underlying the conviction pursuant to which it is ordered if the defendant has, “in a plea agreement or otherwise, consent[ed] to such restitution.” *State v. Reese*, 124 Ariz. 212, 214-15, 603 P.2d 104, 106-07 (App. 1979). In this case, Thompson specifically agreed in her plea agreement that she would “pay restitution to [the victim] for all losses, including losses suffered when [she] shot [him] in the leg.” She has not shown that any

of the restitution ordered was unrelated to those losses. Therefore, although we grant the petition for review, we deny relief.

/s/ *Peter J. Eckerstrom*
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ *Garye L. Vásquez*
GARYE L. VÁSQUEZ, Presiding Judge

/s/ *Virginia C. Kelly*
VIRGINIA C. KELLY, Judge